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No. 957

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

THOMAS NATHAN NORRIS, AND
JOHN FREDERICK BOX, JR., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

AND BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX

LIST OF AUTHORITIES

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

THOMAS NATHAN NORRIS and JOHN FREDERICK BOX, JR., RESPECTFULLY PRAY:

That a Writ of Certiorari issue to review the order of the United States Circuit Court of Appeals for the Fifth Circuit, affirming a Judgment of the District Court for the Southern District of Texas (Galveston Division) convicting Petitioners of a violation of United States Code, Title 18, §99.

Summary Statement of the Matter Involved

Petitioners were prosecuted under indictment* (filed on April 16, 1945) containing two counts. The first was intended to charge a violation of Section 99, Subd. (1), Title 18, U. S. C. A. (R. 4-5).

The Second Count need not be considered since the *jury* as to this count found them *not guilty* (R. 14-17).

The sufficiency of the First Count was unsuccessfully challenged by Petitioners, both by *Motion to Quash* and by *Demurrer* (R. 6-9). The Trial Court, in overruling the *Motion to Quash* and the *Demurrer*, entered a written memorandum stating that it was sufficient for the Indictment to contain merely the language of the Statute (R. 10).

Thereafter, Petitioners pleaded not guilty. The *jury* returned a verdict of guilty on the First Count, and Petitioners were given the *maximum* jail sentence of 10 years, and fined One Thousand Dollars, each (R. 13-18).

The other two named persons indicted with Petitioners were *not* tried on June 6, 1945, *the date of the trial*, nor have they since been tried.

At the conclusion of all the evidence, Petitioners offered none—a Motion for Direction was made by Petitioners, which was overruled (R. 144-145). Their Motion for new Trial (R. 19-22) was likewise overruled (R. 23).

The First Count was based upon Sec. 99, Subd. (1), Title 18, U. S. C. A., which reads as follows:

> "Whoever shall rob another of any kind or description of personal property belonging to the United States, * * * shall be fined not more than $5,000.00, or imprisoned not more than ten years, or both."

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* This indictment was filed, and the cause tried, prior to the effective date of the New Federal Rules of Criminal Procedure.

The Indictment charged that Petitioners, *and two other persons who have not been tried*, on February 27, 1945,

> "did rob one Frank Clarkson, of an automobile, said automobile being then and there a Chevrolet Sedan, bearing Texas license No. Y. 11-469, belonging to the United States; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America" (R. 4-5).

Petitioners contend that the alleged offense being in the words of the Statute, this Indictment was vulnerable to the *Motion to Quash* and the *Demurrer* because it failed to charge the essential elements of the offense; the Statute stating the offense in general and generic terms, and does not clearly define the elements composing the crime. That the vagueness of the accusation in this Indictment is at once apparent when tested by the clearly enunciated principles set forth in the decisions of this Court.

Petitioners further contend that since this offense is taken from the *Common law* (CRABB v. ZERBST (5 Cir.), 99 Fed. (2d) 562), it is not sufficient to charge this offense merely in the words of Sec. 99, Title 18, U. S. C. A., because the word "rob" does not itself fully, directly, and without ambiguity, set forth all the essential elements necessary to constitute the crime intended to be punished. Further, this Indictment based upon the cited statute, particularly since it was called to the Trial Court's attention via *Demurrer* and *Motion to Quash*, should have descended to particulars and charged the essential ingredients of which this crime is composed.

Further, that the general and generic term "rob," standing by itself, constitutes a mere conclusion and does not meet the requisites of common-sense pleading—the issue having been raised by *Demurrer* and *Motion to Quash*. Since the term "rob" had a well-understood meaning at *Common law*,

and the Statute creating the offense does not give a particularized definition of its significance, the pleader should have resorted to the *Common law* for the purpose of arriving at the meaning of the term, and the inclusion of such *Common law* elements of the crime in this Indictment.

As to these contentions, the Court below held, notwithstanding Petitioners' right to be informed fully of the accusation is one vouchsafed them by the Sixth Amendment, " * * * By turning to a dictionary (Webster's International Dictionary) the Appellants could have informed themselves * * * " and further held that a Bill of Particulars would have revitalized this defective Indictment and supplied the material omissions.

Petitioners' contention that a fatal variance between the allegation and the proofs offered by the Government presents an important and substantial question of law. Petitioners asserted that, having elected to specifically charge Petitioners with commission of this crime in Fort Bend County, Texas, such allegation became a matter of substance, as well as proof, which the Government was required to establish by competent evidence. In other words, the Government sought to prove that Petitioners committed the alleged offense in Brazoria County, Texas, whereas, it is alleged in the Indictment it was committed in Ft. Bend County, Texas. The Motion for direction specifically called this to the Court's attention.

Another contention is that the indisputable evidence fails to show an *intent to permanently appropriate* the automobile but affirmatively shows that it was not only taken with the intent to use it temporarily but that it was as a fact, *temporarily used*. That the inferences to be drawn from the facts and circumstances relied upon by the Government to establish Petitioners' intent to permanently appropriate the Game Warden's car were quite as consistent with the theory

that Petitioners, who *simply rode in the car and did not drive the same,* merely took the car for temporary use and not to deprive him thereof. Further, that the proof established that the Petitioners did not take the automobile with any intention of stealing the same, but only intended to use it without the Game Warden's consent and for a *mere temporary purpose.* The evidence was that the car was driven only thirty miles and then abandoned by Petitioners, with the Game Warden in it, undamaged and unharmed.

We shall, in the accompanying brief, go more fully into the testimony to demonstrate the insufficiency of relevant evidence to justify these convictions. As to these contentions, the Court below practically ignored the same.

Jurisdiction

The decision of the Court below was rendered on January 15, 1946 (R. 160-166). Petition for Rehearing was filed January 30, 1946 (R. 168, et seq.), and was by the Court denied February 9, 1946 (R. 171).

Constitutional Provisions Involved

The Fifth and Sixth Amendments guaranteeing the rights of Defendants in criminal prosecutions and securing due process of law, and of being fully "informed of the nature and cause of the accusation" against them.

Statement of Matters Involved and the Grounds Relied Upon for the Allowance of the Writ

The discretionary power of this Court to grant a Writ of Certiorari is invoked on the following grounds:

I.

Because the decision of the Court below that the Indictment was legally sufficient is contrary to the letter and the spirit of the Fifth and Sixth Amendments to the United States Constitution and in conflict with the decisions of this Court in the cases of U. S. v. CARLL, 105 U.S. 611, and U. S. v. STAATS, 8 How. 41, 49 U.S. 41, 12 L. Ed. 979.

II.

Because the holding of the Court below, that a Bill of Particulars would have supplied the omitted material averments, is erroneous and contrary to law, and in direct conflict with the decisions of this Court in the cases of Ex PARTE BAIN, 121 U.S. 1, and U. S. v. NORRIS, 281 U. S. 619.

III.

Because the holding of the Court below, that "Webster's International Dictionary" constitutes a legal substitute for the Fifth and Sixth Amendments guaranteeing the rights of Petitioners in this prosecution and securing due process of law, and of being fully "informed of the nature and cause of the accusation" against them, defies both reason and the law.

IV.

Because there is a direct conflict in the opinion of the Supreme Court in the case of JOLLY v. U. S., 170 U.S. 402; the opinion of the Tenth Circuit in HUDSPETH v. DUFFY, 112 Fed. (2d) 559; the opinion of the Sixth Circuit in RUTKOWSKI v. U. S., 149 Fed. (2d) 481, and the opinion in the instant case.

V.

Because the decision of the Court below involves a matter of deep concern to the administration of Federal criminal law, as well as serious aspects of Federal Criminal justice.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket 11,398, *Thomas Nathan Norris and John Frederick Box, Jr., Petitioners,* v. *United States of America, Respondent,* to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such further relief as this Court may deem proper.

BERNARD A. GOLDING,
Counsel for Petitioners

Dated March_____, 1946.

ESPERSON BLDG., HOUSTON, TEXAS